(2)

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

No. 99-917

In The

Supreme Court of the United States

PINKLEY, INCORPORATED t/a "Bradley Books",

Petitioner,

v.

ROBERT A. SERVACEK, DAVID S. GEARINGER, JOHN LAMMERS, Individually and in their official capacities as police officers of Frederick City Police Department City of Frederick, Maryland; RICHARD J. ASHTON, Individually and in his official capacity as a Major and Chief of Frederick City Police Department and policy maker of City of Frederick, Maryland; and the Mayor and Board of Alderman of City of Frederick, Maryland constituting and acting as City of Frederick, Maryland,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Howard J. Schulman
Counsel of Record
SCHULMAN & KAUFMAN, LLC
100 Light Street, Suite 1330
Baltimore, Maryland 21202-3060
(410) 576-0400

Counsel for Respondents

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

6PP

STATEMENT OF THE CASE

On February 1, 1990, Corporal Servacek prepared a fifteen–page draft application and affidavit for a search warrant, which averred that there was probable cause to believe that the Maryland Criminal Code, 27 Md. Code, " 416D, 418 and 421 (App. 57A-60A) provisions concerning the display and distribution of obscene matters were being violated by the Petitioner. The fifteen -page application and affidavit set forth the investigation and detailed the explicit adult nature of the materials and activities at Bradley Books. Police Chief Ashton and then the State's Attorney reviewed the application and warrant for sufficiency. On February 5, 1990, Corporal Servacek appeared before the Honorable Frederick J. Bowers, a judge of the District Court of Maryland for Frederick County, who reviewed the warrant application and issued the warrant. On February 7, 1990, Corporal Servacek and a search and seizure team of the Frederick City Police Department executed the warrant. Corporal Servacek determined what materials would be seized by attempting to assess whether an item fit within the definition of obscene as set forth in the warrant application. None of the other officers present participated in the selection of materials to be seized. App. 26A-38A.

ARGUMENT

The Court should deny the petition, because the questions presented are vague, ambiguous and difficult to understand. The questions presented are not addressed in the argument in support of the petition, which instead reiterates, nearly verbatim, portions of Petitioner's brief in the Court of Appeals. Petitioner presents no argument that the decision of the Court of Appeals is in conflict with the decision of another court of appeals or a state court of highest resort on an important federal question. Petitioner has not argued that the Court of Appeals in this case departed from the accepted

and usual course of judicial proceedings or sanctioned such a departure. Moreover, Petitioner is simply wrong in face of overwhelming authority contrary to its position.

The first three questions presented address whether the Court of Appeals failed to conduct a *de* novo review of record. There, however, is nothing in the opinion of the Court of Appeals or in the record to support an assertion that the Court of Appeals did not conduct a *de* novo review of the record. The Court of Appeals stated that it was affirming as to the federal claims, for the reasons stated by the district court in its opinion. App. 20A. Petitioner did not even bother to state the basis for its suggestion that the Court of Appeals failed to conduct a *de* novo review of record. Nor did Petitioner raise this issue in the Court of Appeals.

"[T]he question of qualified immunity is not the question whether a constitutional right has been violated." *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990). The district court found that the individual officers executed the warrant upon an objectively reasonable and good faith belief that the warrant was lawful. Their belief was reasonably based on the statutory language contained in the warrant, the review of the warrant and application by the supervising state's attorney and a judge's review of the warrant and application. The individual officers made a concerted effort to insure that the investigation and the ensuing warrant were lawful. A presumption of reasonableness attached to the officers' obtaining a warrant, and Petitioner did not produce any evidence showing that reasonably well-trained officers should have known that the facially valid warrant should have identified each item to be seized with more particularity. Petitioner failed to establish that the individual officers seized the materials for any reason other than evidentiary purposes. Petitioner did not establish that Respondents acted in contravention of any clearly established law of which a reasonably well-trained officer would have known. App. 26A-38A. There was overwhelming authority to support these findings. *United*

States v. Leon, 468 U.S. 897, 920 & n.20, 922-23 & n.23 (1984); *Anderson v. Creighton*, 483 U.S. 635, 639-41 (1987); *Martin v. Gentile*, 849 F.2d 863, 869 & n.7 (4th Cir. 1988); *see also Collinson*, 895 F.2d, at 998-999; *United States v. Edwards*, 798 F.2d 686, 690-92 (4th Cir. 1986); *Torchinsky v. Siwinski*, 942 F.2d 257, 262 (4th Cir. 1991); *United States v. Espinoza*, 641 F.2d 153, 164-165 (4th Cir.), *cert. denied*, 454 U.S. 841 (1981); *Sequoia Books v. McDonald*, 725 F.2d 1091, 1093-94 (7th Cir.)(applying *Espinoza* to a ' 1983 action), *cert. denied*, 469 U.S. 817 (1984); *United States v. George*, 971 F.2d 1113, 1124 (4th Cir. 1992)(when the inquiry was properly focused on the objective reasonableness of the officers' actions, it was evident that the officers did reasonably believe that their conduct was fully consistent with the Fourth Amendment as the officers consulted with the county prosecutor as to whether to apply for the search warrant and thereafter received the facially valid warrant from a duly authorized judicial official; and, the affidavit contained no false statements). Indeed, in *Leon*, several deputy district attorneys reviewed the application for the warrant, which was facially valid and issued by a state court judge.

Petitioner has not pointed to any conflict among the circuits that would suggest review by this Court would be in the public interest. Nor could it. *Sequoia Books*, for instance, rejected the very arguments made by the Petitioner in this Court. *See* 725 F.2d, at 1093. *See also Randall Book Corporation v. State*, 64 Md. App. 589, 602 (1985)(In view of *Leon*, it is immaterial whether the search warrant was defective as either authorizing the seizure of First Amendment protected material or in permitting the police officers to determine what materials were obscene), *cert. denied*, 305 Md. 175 (1986), *cert. denied* 480 U.S. 940, *reh. denied*, 481 U.S. 1060 (1987).), *cert. denied*, 305 Md. 175 (1986), *cert. denied* 480 U.S. 940, *reh. denied*, 481 U.S. 1060 (1987).

Petitioner relies upon a plethora of cases, for the proposition that the search warrant in question was forbidden by "clearly established law". Such cases articulate broad propositions and are not fact specific to this case and, therefore, do not define the contours of "clearly established". *Anderson*, 483 U.S., at 639-41. Here, the case law indicates that the specific propositions advanced by Petitioner, i.e., that the warrant was overly broad and did not establish probable cause as to each item that was seized and that a pre-seizure adversary hearing was mandated, are not "clearly established", even if they were correct. *See e.g. Espinoza* and *Sequoia Books; see also Heller v. New York*, 413 U.S. 483, 487-90 (emphasizing the distinction between a seizure pursuant to a warrant effecting a temporary removal from an owner's possession and a seizure for purposes of destruction; finding the absence of either a final or temporary restraint by a seizure pursuant to a warrant; noting that petitioner made no pretrial motions seeking return of the film or challenging its seizure or requesting expedited judicial consideration of the obscenity issue, so as to obtain a prompt judicial determination of the obscenity issue in an adversary proceeding, if petitioner had desired; excluding from any consideration of "promptness" those delays caused by the choice of a defendant in state court criminal proceedings); *Greenmount Sales Inc. v. Davila*, 479 F.2d 591, 593-94 (4th Cir. 1973)(Concluding that the First Amendment did not require an adversary hearing prior to a seizure pursuant to a warrant directing police to search for "obscene items" and distinguishing *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir.1969) and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964)).

The Court in *Heller*, 413 U.S., at 487-490 unequivocally rejected that a prior adversary hearing is required in all cases where allegedly obscene material is seized. Likewise, *Roaden v. Kentucky*, 413 U.S. 496, 502-507 (1973) indicates that a warrant for the seizure of allegedly obscene materials on the basis of non-conclusory

assertions with a review of some of the materials by a magistrate is constitutional.

Petitioner argues that the Court of Appeals erred in concluding that the district court should not have exercised supplemental jurisdiction over the state law conversion claims. Without arguing a conflict among the decisions of the courts of appeals on a question of law, Petitioner points to those decisions in which the courts found an issue tried by the implied consent of the parties. Here, however, the Court of Appeals found that Petitioner failed to plead or include in the pre-trial order a state law claim and that Respondent had not consented in any fashion to the trial of a state law conversion claim. App. 15A-20A.

Plaintiff raises an evidentiary question concerning the admission of hearsay statements by Sobus made in state court, when he pled guilty to the obscenity charge. The record reflects, however, that the Plaintiff did not object at trial. The question was not raised or decided in the district court. Nor was this question decided by the Court of Appeals.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests the Court to deny the petition.

Respectfully submitted,

Howard J. Schulman
Counsel of Record
SCHULMAN & KAUFMAN, LLC
100 Light Street
Suite 1330
Baltimore, Maryland 21202-3060
(410) 576-0400

Counsel for Respondents